No. 15597

In the
United States Court of Appeals
For the Ninth Circuit

MELVIN TANZER,
Appellant
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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MELVIN TANZER, *Appellant* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15597

Appellant's Opening Brief*

Melvin Tanzer was accused by an indictment of violating smuggling statutes of the United States, and more particularly of violating the Narcotics Drug Import and Export Act of February 8, 1909 as amended, being Section 21 U. S. C. 173.

The Appellant plead not guilty to the charge and on March 1, 1957 the Appellant was tried before a Jury. During the course of trial the Appellant duly objected to the introduction of evidence alleged by him to be improperly identified, and duly objected to testimony tending to prove the commission of a crime other than which he was then being tried.

*Numbers cited in parentheses are references to pages of the Transcript of Record unless otherwise indicated.

The defendant had been asked on cross examination if he had ever given a Government witness a narcotic kit. This was denied by the defendant.

The Government was permitted in rebuttal, over the objection of counsel, to introduce evidence of the government witness to the effect that the defendant had delivered to him a narcotic kit. This testimony was not only highly prejudicial, but tended to influence the Jury materially because the alleged transaction proved on rebuttal did not have the slightest connection with the matter for which the defendant was then being tried, and the admission of such evidence constituted prejudicial error because it concerns a collateral matter as to which inquiry stops with the answers of the witness.

The Government attempted to prove the commission of a crime other than the crime for which he was then being tried. Throughout this type evidence the Appellant objected continuously, but the trial Court admitted such evidence.

At the conclusion of all the evidence presented by the Government, the Appellant made a motion that the Court direct the Jury to return a verdict of not guilty on the grounds and for the reasons that:

(1) The evidence was not sufficient to show a violation of the law as charged in the indictment or at all.
(2) The evidence was insufficient to show that the exhibit which had been admitted in evidence was properly identified.

(3) Proper foundation was not laid for its introduction.

(4) Without the exhibit there was not sufficient evidence to submit to the Jury.

The Court denied the motion.

At the conclusion of all the evidence in the case the Appellant again renewed the above motions and the Court again denied the motions.

The Jury returned a verdict finding the defendant guilty.

Prior to the date set for sentencing the Appellant filed a motion for a new trial. The Court denied said motion for new trial.

The Appellant appeared before the trial Court on March 11, 1957 for the purpose of sentencing, and duly objected to Government filed information that charged that the Appellant had been previously on the 26th day of January, 1953 in said Court in Tucson, Arizona in Case No. 13662 convicted of violating Section 174 of Title 21 of the United States Code, which charged that he had received, concealed, and facilitated transportation of a quantity of opium.

The essence of the information charged that the conviction in the instant case at bar was in fact his second conviction of violating laws of the United States with regard to the control of narcotic drugs.

The Appellant duly objected to the filing of this information on the grounds that the instant convic-

tion was his first conviction under the amended Act and that to make him liable for a second conviction would be in the nature of an *ex post facto,* and would be depriving him of his rights under the Fourth Amendment of the Constitution of the United States. The Court overruled the objection and denied the motion to strike the information and proceeded to sentence the Appellant to serve a sentence of ten years.

From said judgment and sentence the Appellant prosecutes this Appeal.

JURISDICTIONAL STATEMENT

(1) Jurisdiction of the District Court:

18 U. S. C., Sec. 3231, provides that:

> "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

(2) Jurisdiction of this Court upon appeal to review the judgment:

28 U. S. C., Sec. 1291 reads:

> "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

28 U. S. C., Sec. 1294 reads in part:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the court of appeals as follows: (1) From a dis-

trict court of the United States to the court of appeals for the circuit embracing the district. . . ."

(3) The pleadings necessary to show the existence of jurisdiction:

(a) The Indictment (3).
(b) Plea of "Not Guilty." (4)

(4) Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction on appeal to review the judgment in question.

These facts are set forth in the introductory sentences to this Brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

(A) The questions in this case before this Court are as follows:

(1) Did the trial Court err in failing to instruct the Jury in regard to evidence of good reputation even though the defendant did not make a specific request for instruction regarding the testimony of good reputation?

(2) Did the trial Court err in permitting the Government witness to testify in rebuttal that the defendant had delivered to the Government witness a narcotic kit and which evidence tended to prove a separate offense independent of the offense for which the defendant was then being tried, and which had no connection whatsoever with the case at bar, and which evidence was admitted over the objections of the defendant?

(3) Did the trial Court err in admitting into evidence Government Exhibit No. 2 and in denying the motion to strike and denying the motion for directed verdict based upon the fact that the exhibit was not properly identified?

(4) Did the trial Court err when the defendant was sentenced to a term of imprisonment of 10 years in that the punishment for the crime was increased subsequent to the commission of the alleged crime? Was the Court in error in treating the appellant a second offender under the Amended Act.

(B) The facts out of which all of these questions arise are as follows:

Melvin Tanzer, a resident of Tucson, Arizona, agreed in the month of May, 1956, to act as a "decoy" to entice into the United States with a supply of narcotics a Mexican national, identified as Francisco, which "Pancho" is a nickname or contraction for, and the true identity of whom was known to all the United States Customs Agents. (49).

San Angelo, a State of Arizona Agent, advised him that, "if you help us in effecting the arrest of this Pancho I won't press this charge." (49).

It was agreed that Melvin Tanzer would work for the United States Customs Office and assist them in any way to effect the arrest of "Pancho", and it was agreed that there would be a further meeting in Nogales, Arizona on June 4, 1956. At that time Melvin Tanzer was assured that he would be given a reward from the Government as payment for his trouble as an informer. (50).

There was a meeting on June 4, 1956 in Nogales, Arizona, and Tanzer stated that the Mexican dealer would deliver a pound of heroin, but at a date not yet settled.

On the 12th or 13th of June, 1956 Tanzer again came into the United States Customs Agents Office at Nogales, Arizona, and present at that time were the two State Agents, and he reported to the United States Customs Agents Office. (52).

Melvin Tanzer at that time turned over to State Agent San Angelo a small package, (55), "it's a sample to show that this fellow has the stuff."

State Agent San Angelo took possession of this package. The State Agents did not arrest the Appellant for bringing this package from Mexico and neither did the United States Customs Agent for the reason that Federal Agent Leonard Viles stated, (56), "he was working with us and he brought it out and declared it and it was taken by a State Agent, and I knew it wasn't going to enter into any domestic commerce. I had hopes of arresting a larger violator, and I didn't make any arrest at that time."

On June 19, 1956 Tanzer again met with the law enforcement officers in Nogales, Arizona, and again reported the condition of the negotiation between Pancho and himself for the delivery of narcotics into the United States, and for the purpose of effecting the arrest of this narcotic dealer.

On June 22, 1956 there was a further meeting in Nogales, Arizona and the agents advised him that they had to have something definite as the various meetings held were not accomplishing anything.

On July 23, 1956 Melvin Tanzer was apprehended at the Inspection Station on Grande Avenue, Nogales, Arizona, and at that time he stated that the narcotics, identified as Government's Exhibit No. 2, were being brought over for United States Customs Officer, Leonard Viles.

Tanzer contends that the narcotics were brought over pursuant to his understanding with said State Agent San Angelo and the United States Customs Agents.

The United States Government contends that the bringing of the narcotics was an act of his own doing and was in violation of law. The exhibit was placed in the hands of the Chief Customs Inspector, John H. Flanagan, who was custodian of seized property.

(C) The manner in which the issues are brought before this Court:

After the hearing before the United States Commissioner, Appellant was duly indicted, and brought to trial before the United States District Court.

(1) The trial Court did admit into evidence the Government's Exhibit No. 2, over objections, based upon the fact that exhibit was not properly identified. The evidence shows that while there was continuity of possession there was no evidence whatsoever to show that the contents of the package remained the same, and that lack of evidence that the contents of the package was the same was fatal to the Government's case.

(2) During the trial the Government was permitted, over strenuous continuous objection, to testify in rebuttal that the defendant had delivered to a Government witness a narcotic kit, which evidence tended to prove a separate and distinct offense independent of the offense for which the defendant was then being tried and

which had no connection whatsoever with the case at bar.

At the conclusion of the trial a motion was made to return a verdict of not guilty on the grounds and for the reason that the evidence was not sufficient to show a violation of the law as charged in the indictment or at all, and further that the evidence was insufficient to show that the exhibit which had been identified in evidence was properly identified, and that no proper foundation was laid for its introduction, and without the exhibit there was not sufficient evidence to submit to the Jury.

The Court denied the motion.

The Jury found the defendant guilty.

A motion for new trial was timely filed on the following grounds:

(1) The verdict is contrary to the weight of the evidence.

(2) The verdict is not supported by substantial evidence.

The Court erred in admitting in evidence Exhibit No. 2 and in denying motion to strike, and in denying the motion for directed verdict based upon the fact that the exhibit was not properly identified.

(3) The Court erred in failing to instruct the Jury in regard to evidence of good reputation.

(4) Permitting Government witness to testify in rebuttal that the defendant had delivered to him the narcotic kit.

The Court denied the motion for a new trial.

The defendant then objected to the filing of an information alleging prior conviction, on the grounds that his punishment was fixed at imprisonment for the longer term prescribed in the Act, and that such longer term of imprisonment is in the nature of *ex post facto* where the conviction described in the information was prior to the enactment of the Act, as amended, that the Defendant was in fact, a first offender under the Amended Act.

SPECIFICATION OF ERROR RELIED ON:

The questions involved in this case are whether or not the trial Court erred in the following manner:

Specification No. 1—The trial Court erred in failing to instruct the Jury in regard to evidence of good reputation even though the defendant did not make a specific request for an instruction regarding the testimony of good reputation.

Specification No. 2—The Court erred in permitting Government witnesses to testify in rebuttal that the Appellant had delivered to him a narcotic kit.

Appellants contend that the Court erred in permitting in rebuttal to introduce evidence of a Government witness to the effect that sometime prior to the time in the instant case the defendant had delivered to him (the Government witness) a narcotic kit and told him that he (the defendant) had another in his service station.

Appellants contend this testimony was highly prejudicial and was evidence which tended to prove

a separate offense independent of the offense of which the defendant was then being tried and had no connection whatever with the commission of the crime involved.

Appellants contend that this rebuttal testimony was a collateral attack in no way connected with the charge in the indictment and that the Government was bound by the answer given on cross-examination.

Specification No. 3—The Court erred in admitting into evidence Exhibit No. 2 and in denying the motion to strike and denying the motions for directed verdict based upon the fact that exhibit was not properly identified.

Appellant contends that the Exhibit No. 2 which was the narcotics allegedly transported into the United States was never properly identified. While the evidence shows that continuity of possession it does not show that the contents of the package remained the same.

Appellant contends that lack of evidence that the contents of the package were the same is fatal to the Government's case and that the exhibit could not then be properly admitted into evidence.

Specification No. 4—The Court erred in sentencing the defendant to a term of imprisonment of ten years.

Appellant contends that the punishment of the defendant in the instant case was increased by statute subsequent to his first conviction, and that such an increase of punishment is *ex post facto* and a violation

of law and a denial of due process, since his prior conviction was prior to the enactment of the Act, as amended. That the Appellant was a first offender under the Amended Act.

LAW OF THE CASE

Appellant respectfully maintains that the various propositions of law which appear in the case at bar are as follows:

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 1—The trial Court failed to instruct the Jury on the question of the good reputation of the defendant. In criminal cases the Court must instruct on all essential questions of law whether or not the Court is requested to do so.

> *Samuel vs. United States,* 169 F. 2d 787;
> *United States vs. Leroy,* 153 F. 2d 995;
> *Thomas vs. United States,* 151 F. 2d 183;
> *Morris vs. United States,* 156 F. 2d 525.

The question arising in the case before this Court is whether in the absence of a request therefor the trial Court erred in not instructing on the issue of defendant's reputation.

In the case of *Springer vs. United States,* 148 F. 2d 411 at page 415, which is a Ninth Circuit case, this Court held:

> "the only complaint made by the appellant to the Court's instructions to the Jury is that no instruction was given to the Jury with reference to the

effect of the testimony as to his good reputation and character."

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 2—The trial Court erred in permitting the Government witnesses to testify in rebuttal that the defendant had delivered to the Government witness a narcotic kit and which evidence tended to prove a separate offense independent of the offense for which the defendant was then being tried, and which had no connection whatsoever with the case at bar, and which evidence was admitted over the objection of the defendant.

Coulston vs. United States, 51 F. 2d 178, laid down the law which is to this day cited with approval in all jurisdictions that:

> "evidence is not admissible on rebuttal to contradict defendant for it concerns a collateral matter as to which inquiries stopped with the answers of the witness."

United States vs. Sager, (1931-CA 2d N.Y.) 49 F. 2d 725, further states:

> "Evidence which tends to prove a separate offense for which the defendant is tried and which has no connection whatsoever with the case at bar was admitted over the objection of the defendant when no foundation was laid for such testimony. This was collateral attack and in no connection with the act charged in the indictment and the government was bound by the answer given on cross-examination."

Hodge vs. United States, (1942-75 App. DC 332), 126 F. 2d 849.

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 3—The law involved is whether or not sufficient evidence was introduced to properly identify the Government's exhibit. The exhibit was not properly identified and as to the body of law in such matters the leading case is *Boyd vs. United States,* which is a case arising out of this circuit in 1929. (*Boyd vs. United States,* 30 F. 2d 900).

The *Boyd* case, it is to be noted, is cited throughout the Federal Reporter system and it has taken the status of being the law that the lack of proof that the contents of the package were the same is fatal to the Government's case and the Government Exhibit could not then be properly admitted into evidence.

We respectfully call the Court's attention to page 901 of the *Boyd* case and there it is said:

> "The officer . . . testified that the contents of the bag were then in the same condition as when first seized . . . there was therefore no error in the admission of the bag and its contents in evidence."

LAW OF THE CASE INVOLVED IN SPECIFICATION NO. 4—*Calder vs. Bull,* 3 Dall 386, 1 L. Ed. 648, enunciated the law pertaining to *ex post facto* statutes within the meaning of our Article I, Sections 9 and 10 of the United States Constitution:

> "Every law that aggravates a crime or makes it greater than it was when committed and every

law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

Strong vs. State, 1 Blackf., Ind. 193, further states:

"The words 'ex post facto' have a definite technical signification. The plain and obvious meaning of this prohibition is that the legislature shall not pass any law after a fact done by any citizen which shall have relation to the fact so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; *or to increase the malignancy of a crime.*"

ARGUMENT

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 1—The Appellant in the case at bar introduced evidence as to his good character and reputation. The Trial Court failed to instruct the Jury on the question of the good reputation of the defendant.

Counsel contends that in criminal cases the Court must instruct on all essential questions of law whether or not the Court is requested to do so.

Samuel vs. United States, 169 F. 2d 787;
United States vs. Leroy, 153 F. 2d 995;
Thomas vs. United States, 151 F. 2d 183;
Morris vs. United States, 156 F. 2d 525;
Krinier vs. United States, 11 F. 2d 722;
Stassi vs. United States, 50 F. 2d 526.

The question arising in this case before this Court is whether in the absence of the request therefore the trial Court failed in not instructing upon the Appellant's reputation.

In the case of *Springer vs. United States,* 148 F. 2d 411, at page 415, which is a Ninth Circuit case, this Court held:

> "the only complaint made by the Appellant to the Court's instructions to the Jury is that no instruction was given to the Jury with reference to the effect of the testimony as to his good character."
>
> "No request was made by the Appellant for any instruction upon that subject and *under the circumstances* we think none was required because the evidence was *irrelevant.* It is true that it has been held in connection with instructions to the Jury that *it is the duty of the Court to cover the issues involved even in the absence of request.* This does not require instructions as to good character where the *evidence is irrelevant* and the defendant admits that he deliberately refused to do that which the law required him to do." (emphasis ours).

The Court in the above case indicated that where the *evidence is relevant,* and that evidence of good character for truth, honesty and integrity would tend to support a theory of innocence, that it is the duty of the Court to instruct on the question of character.

In the instant case before this Court the character and reputation of the defendant was *extremely relevant* in that it went to the very essence of his defense

in that the good character did support the truth of his statements that he was in truth and in fact working for the Federal officers with their full consent.

There were three character witnesses who testified as follows for the defendant:

(1) Sol Behar, the employer of the defendant. (128).

Q: Are you acquainted with his reputation in this community for honesty and integrity and as a law-abiding citizen?

A: Oh, yes.

Q: What is that reputation, good or bad?

A: Well, it has always been good. Always good.

(2) The next character witness for the defendant was Harry Shiff, a building contractor. (131).

Q: I will ask you, Mr. Shiff, if you know of your own knowledge of Mr. Tanzer in the community, what his reputation is in the community in which he lives during the past two years for being a law-abiding citizen?

A: As far as I know he had a good reputation.

(3) The third character witness was Ralph Sohnen. (132).

Q: From your acquaintance and knowledge do you know his reputation for being a law-abiding citizen?

A: Yes, sir.

Q: What is it, good or bad?
A: Good.

The reputation of the defendant was an important phase of the evidence. The failure of the Court to so instruct the Jury was highly prejudicial to the defendant due to the fact that his entire defense was predicated upon his honesty and integrity and such an instruction may have caused a reasonable doubt as to the defendant's guilt in the case tried in the District Court.

Appellant points out to the Court that the Government did not produce any witnesses to impeach the defendant's reputation so therefore we must rely on the presumption that the defendant's reputation for honesty and integrity in the community was good.

It is the contention of the Appellant that the failure of the Court to give on its own volition an instruction was reversible error. Appellant contends that the function of an instruction by the Court to the Jury is to convey to the minds of the Jury the correct legal principals that are to govern them in weighing evidence given to them and that upon their determination of the facts from the evidence that may apply the correct principles of law and thereby decide correctly and justly between the parties in accordance with both law and evidence. *Lakeshore Company vs. Whiddin,* 2 Ohio Cir. Ct. (N. S. 544).

An instruction is an explanation of the principles of the law applicable to the case in its entirety which it is a duty of the Jury to apply in order to render a

verdict establishing the rights of the parties. The Jury does not bring the informed understanding of a learned Court and respected counsel into their consideration of the case and it is a duty of the trial Judge to impart to the Jury all of the law of the case. It is a rule, whether requested or not, the Court should instruct on every essential question in the case so as to properly advise the Jury.

The trial Court, nor any Court, does not have the insight in deliberation of the Jury room as to the weight of the testimony of character witnesses without an instruction given by the Court to guide the Jurors, and failure of the Court to give such instruction is prejudicial to the rights of the accused and fatal error. Who is to say what the effect of such instruction would have upon the minds of the Jurors.

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 2—The great legal propositions involved in the issues presented in specification No. 2 strikes at the very core of the liberties guaranteed to an accused under the Fourth and Fifth Amendment of the United States Constitution. The invisible, intangible and ever-present sentinel of a free man is the Fourth and Fifth Amendments to our Constitution, and are the curbs to the over-zealous servant of his sovereign.

The law as laid down in *Coulston vs. United States,* Circuit Court of Appeals, Tenth Circuit, 51 F. 2d 178, has never been reversed and the law enunciated therein is controlling law and cited as such to this date and it laid down the rule that testimony tending to prove a

separate offense independent of the offense for which the defendant was being tried was prejudicial and a violation of defendant's right and constitutes reversible error. The *Coulston* case is a case involving narcotics and the case at bar is one involving narcotics.

In the *Coulston* case the Court permitted an inquiry into a controversy between defendant and a narcotic agent and then on rebuttal the Government was permitted to prove over objections its version of the transaction as well as the further conversation between the agent and defendant over $1,750.00 worth of morphine. The Circuit Court commenting on this case stated that *neither* of the transactions proven on rebuttal had the *slightest connection* with the sale for which defendant was being tried and held that the *admission of such evidence constituted prejudicial error.* We quote the following from the testimony:

> "Tested by these rules, the questions asked on cross-examination of the defendant were improper. That a controversy occurred, some thirteen months after the sale charged, between a narcotic agent and the defendant over the repayment of $25, or that at an unnamed date the two of them had a controversy concerning other morphine, *did not impeach* the *credibility of the witness.* But, even if the cross-examination were proper, the *evidence* received *was not admissible* on *rebuttal* to *contradict defendant,* for it *concerns* a *collateral matter as to which inquiry stopped with the answers of the witness.*"

The text in 20 American Jurisprudence, at page 278, section 302, states generally that evidence of other acts

even of a similar nature must have some connection in some special way with the act charged. The purpose of permitting evidence of a prior conviction is not proof that the defendant is more apt to have committed the crime charged but is for the sole purpose of effecting his credibility.

Evidence that the defendant may have possession of a narcotic kit was introduced by the Government not for the purpose of effecting the defendant's credibility but for the purpose of convincing the jury that he would be more likely to have committed the crime he was charged with.

We again wish to quote from *Coulston vs. United States, supra,* at page 182 of the opinion, in which the Court quoted from an opinion by the Eighth Circuit as follows:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the Jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial Court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the Jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

The foregoing quotation is particularly applicable to the present case. It makes no difference how strong

the Government's case might appear, the defendant is entitled to a trial conducted according to the established rules of evidence and prejudicial matter not material should not be admitted.

The defendant was asked on cross-examination if he had ever given to the Goverment witness, San Angelo, a narcotic kit. (122).

Mr. Roylston:

Q: Did you have any narcotics equipment or paraphernalia?

A: No.

Q: During this time when you were going back and forth to Nogales with San Angelo, did you ever turn over a narcotics kit to him?

A: No.

The transcript will further show that the Government witness San Angelo was permitted, over the objections of the defendant, at pages 135, 136 and 137 thereof, to testify in rebuttal about the deliveries to the defendant of a narcotic kit and further that the defendant had another narcotic kit in his service station, and we quote:

By Mr. Roylston:

Q: I will ask you if Mr. Tanzer at any time ever turned over a narcotics kit to you.

A: Yes.

Q: Did he at that time discuss having a narcotics kit at any other place?

Mr. Flynn: I object. No foundation has been laid for any conversation between this witness and

the defendant and it certainly could not be proper impeachment. It has nothing to do with the alleged offense in this case. Therefore it is a collateral matter and impeachment foundation should have been laid. . . .

Q: Did Mr. Tanzer at that time tell you he had a narcotics kit at any other place?

A: Yes, he did.

Q: What did he tell you in relation to the other kit, as near as you can remember?

Mr. Flynn: May our continuing objection to this line of questioning on the ground that foundation has been laid and not proper rebuttal, and no impeachment foundation laid?

The Court: Very well. The record may so show.

Mr. Roylston: Do you recall the last question?

A: No.

Q: (By Mr. Roylston): What did Mr. Tanzer tell you in relation to this narcotics kit other than the one he turned over to you?

A: He told me he had one stashed in a gasoline station.

It is evident that prejudicial error was committed in the trial of this case in the admission of testimony involving transactions which tend to prove commission of a crime other than the one before the bar. It is true that there is a vast body of law that allows introduction of testimony involving commission of other crimes such as sex offenses and crimes involving moral turpitude, but our Courts are zealous in their protection of the rights of the individual citizen when the

testimony being introduced which tends to prove the commission of another crime other than the one for which he is being tried.

The crime before the District Court was one involving the importation of narcotics into the United States. The crime for which the testimony admitted into evidence and duly objected to, pertained to the possession of a narcotic kit. The inference to be determined by the Jury was that one who possessed a narcotic kit must have needed narcotics and that he therefore must have been guilty of the importation into the United States in violation of a law of a quantity of narcotics.

The proof offered on rebuttal with reference to the possession of a narcotic kit had not the slightest connection with the importation for which the defendant was being tried, this the Appellant contends was prejudicial error.

The issue presented was a simple one; did the defendant import into the United States in violation of law a quantity of narcotics as testified to by the Government witness. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the Jury from the issue. The Jury could only be confused by the admissibility of proof of other offenses.

It left the Jury an open door of conjecture when such door should have been barred to them and the case submitted to it by legally admitted evidence. If the improper evidence admitted was calculated to

make such an impression on the Jury this Court must reverse the verdict and the cause remanded for new trial.

Boyd vs. United States, 142 U. S. 450; 35 L. Ed. 1077;
Hall vs. United States, 150 U. S. 76; 37 L. Ed. 1003;
Cucchia vs. United States, 17 F. 2d 86;
Wigmore, on Evidence, 2d Ed. Sec. 194;
16 Corp. Juris. Sec. 586.

The *Coulston* case further lays down the rule at page 181 of 51 F. 2d, that whenever the defendant takes the stand he may be impeached in the same manner and to the same extent as any other witness and no further.

Raffel vs. United States, 271 U. S. 494; 70 L. Ed. 1054;
Madden vs. United States, 20 F. 2d 289.

Questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth"; when such a *question is asked and answered,* the *inquiry is ended*; the Government is bound by the answer in that it may not, on rebuttal, offer countervailing proof. To this latter rule, there is one exception: In criminal cases, a witness may be asked, for purpose of impeachment,

whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible.

But, even if the cross-examination were proper, the evidence received was not admissible on rebuttal to contradict defendant, for it concerns a collateral matter as to which inquiry stopped with the answers of the witness.

The law as outlined in the *Coulston* case is further upheld in the case of *Lloyd vs. United States,* 226 F. 2d at page 9, as follows:

> "Admission of evidence with respect to defendant's offer to compromise income tax and alleged untrue statement was prejudicial to defendant where it indicated to Jury that defendant had cheated on his income tax over a period of years."

The Court held in the case of *Fallen vs. United States,* 220 F. 2d 946, as follows:

> "In prosecution under indictment relating to stolen motor vehicle evidence of perpetration of other like offenses was *not* needed to establish criminal motive or intent where proof of commission of act involved carried with it evident implication of criminal intent and constituted *reversible error.*"

In a 1955 case arising in the Ninth Court of Appeals for the Fifth Circuit, *Helton vs. United States,* 221 F. 2d 338, involving the disposition of marijuana the Court there held as follows:

"It is hornbook that, absent a requirement of showing system or intent, *evidence of offenses not charged in the indictment is not only inadmissible, but prejudicial if admitted* . . . It is true that here the trial Court ordered the improper evidence stricken from the record, but he gave no instruction whatever to the Jury to disregard the improper testimony. In fact, in the circumstances of this case, it is doubtful that any instruction, however strong, would have succeeded in destroying the picture which this remark created in the Jury's mind of the appellant smoking marijuana, with marijuana growing in his back yard, with some in his bedroom and some in his car. The defense in this case suggested that the marijuana found on the appellant's premises was left there by a former roomer. Whatever hope the appellant had of the Jury's accepting that defense was blighted by the admission that appellant himself was a marijuana smoker."

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 3—The law involved in this specification is whether or not sufficient evidence was introduced to properly identify the Government's exhibit.

The Appellant contents that the exhibit was not properly identified and relies on the law in *Boyd vs. United States,* which is a case arising out of this Circuit in 1929. (*Boyd vs. United States,* 30 F. 2d 900).

It is admitted that the evidence adduced at the time of trial showed a continuity of possession, but from the doctrine evolved from the *Boyd* case it is contended

that there must likewise be shown a *continuity of condition* of the Government's Exhibit.

No testimony was introduced to show that the contents of the package remained unchanged.

In the *Boyd* case the defendant when arrested was found to be in possession of a key to a small bag which could be opened only with that key and which bag contained a quantity of morphine. The bag was placed in a larger bag and placed in a safety deposit box by the Customs Office where it remained until a day before the trial. It was forwarded by rail. The bag so sealed was admitted at the time of trial; presented by the arresting officer and the seal opened in the presence of the Court and Jury. The arresting officer and baggageman testified that the contents of the bag were in the same condition as when first seized.

The *Boyd* case, it is to be noted, is cited throughout the Federal Reporter system and it has taken the status of being the law that the lack of proof that the contents of the package was the same is fatal to the Government's case and the exhibit could not then be properly admitted into evidence.

We respectfully call the Court's attention to page 901 of the *Boyd* case and there it is said:

> "The officer . . . testified that the *content*s of the bag were then in the *same condition* as when first seized . . . there was *therefore* no error in the admission of the bag and its contents in evidence." (Emphasis ours.)

From all the reasoning in the *Boyd* case, *supra,* Appellant contends that there must be evidence of continuity of condition of the Government's Exhibit to allow it to be admissible in evidence, and therefore failure of the Government to prove this essential element of admissibility bars this Exhibit from evidence, and henceforth, the Trial Court committed reversible error.

ARGUMENT ON ISSUES RAISED IN SPECIFICATION NO. 4—It is conceded that since the filing of this appeal, counsel has read the case arising in this Circuit, *Wilson vs. United States,* 205 F. 2d 567, in which this Court upheld the doctrine that the amended statute is constitutional and which provides for longer imprisonment in cases of prior conviction, notwithstanding that such convictions antedated the Act, and is not *ex post facto.*

Counsel concedes that if this Court should follow the identical doctrine laid down in the *Wilson* case that his plea that the statute which provides for increased punishment in case of convictions which took place before such statute was enacted is *ex post facto* would not be heeded. With the utmost respect to this Court, counsel in support of his contention that the law is *ex post facto* submits the following for the Court's further consideration.

The classic definition of "ex post facto" law within the meaning of Article I, Sections 9 and 10 of the Federal Constitution was enunciated by Justice Chase in *Calder vs. Bull,* 3 Dall 386, 1 L. Ed. 648.

> "Every law that aggravates a crime or makes it greater than it was when committed and every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed."

In the case of *Strong vs. State,* 1 Blackf., Ind. 193, it is further stated:

> "The words 'ex post facto' have a definite technical signification. The plain and obvious meaning of this prohibition is that the legislature shall not pass any law after a fact done by any citizen which shall have relation to the fact so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; *or to increase the malignancy of a crime."*

The Appellant feels that providing for a mandatory ten years for a second offense narcotic conviction where the first offense was committed prior to the legislation making the sentence mandatory increases the malignancy of the first offense, and that by the definition of *ex post facto* laid down in *Calder vs. Bull,* inflicts a greater punishment than the law annexed to the crime when the crime was committed.

It is contended that making a greater punishment to one person than another would receive, since the amendment of the statute, is in violation of due process.

Const. Art. 1, Sec. 10 forbids application of any new punitive measures to crime already consummated to detriment or material disadvantage of wrongdoer.

Ex post facto law is one which renders an act punishable in manner in which it was not punishable when it was committed, or which deprives an accused of any substantial right or immunity possessed by him before its passage.

An *ex post facto* law is one that materially alters the situation of the defendant to his disadvantage after the commission of the crime charged, (107 U. S. 221), or aggravates past crimes or increases punishment therefor.

An *ex post facto* law is a statute of a criminal nature which punishes acts that took place prior to its enactment.

Legislature is *ex post facto* which aggravates a crime, or makes it greater than when it was committed, which changes punishment and inflicts greater punishment than law annexed to the crime when it was committed.

The Appellant respectfully submits to this Honorable Court that the act under which the defendant was convicted should be construed to mean that the prior convictions therein referred to are convictions which must have taken place after the amended Act was enacted. That to otherwise construe would be *ex post facto* and a denial of the defendant's constitutional guarantees.

SUMMARY AND CONCLUSION

Appellant submits that the judgment of the trial Court should be reversed and a new trial ordered and in support therefor represents that these fundamental points of law are controlling the facts involved:

1: The failure of the trial Court to include in its instructions to the Jury an instruction of the good reputation of the defendant. Counsel urgently contends that the Court must, on its own, even though the Court is not instructed to do so, instruct the Jury with reference to the effect of the testimony of the defendant's good character, especially where such *testimony was relevant* and *not contradicted* by the Government. We sincerely believe that the failure of the Court to so instruct was prejudicial to defendant due to the fact that his entire defense was predicated upon his honesty and integrity and such an instruction may have caused a reasonable doubt as to the defendant's guilt in the case.

2: That the introduction of evidence, permitted over objection, which tended to prove commission of a crime other than the one for which the defendant was then being tried was prejudicial error. Remote and disconnected transactions have no evidentiary bearing, and at best they could serve but to create an atmosphere of hostility and to distract the Jury from the issue of whether or not the Appellant brought into the United States narcotics. The Jury could only be confused of the admissibility of proof of other crimes. The fact that the Court did not strike it and allowed

the evidence to be brought forth must have had a profound effect on the Jury.

It left the Jury an open door of conjecture when such door should have been barred to them and the case submitted only on legally admitted evidence, and this Court must now reverse the verdict and the cause remanded for new trial.

3: The question involved in our Specification No. 3 was whether or not the Government's exhibit was properly admitted into evidence. To be properly identified there must exist parallel avenues through which qualified evidence must travel to allow the Government's exhibit to be admitted into evidence.

a: There must be shown a continuity of possession. Under the doctrine of law in the *Boyd* case, *supra,* it is laid down that there must be shown by testimony continuity of possession before the exhibit can qualify for legal admission into evidence.

b: There must likewise be shown continuity of condition of the contents of the package under the doctrine of law in the *Boyd* case, *supra.*

The foregoing we believe has not been done in the instant case.

4: We respectfully acknowledge that this Court has enunciated its opinion in the *Wilson* case cited *supra* that the act as amended does not mean that prior convictions therein referred to are convictions which must have taken place after the act was enacted, and that the Act is not *ex post facto.* Counsel respectfully petitions that this Court reconsider and that this Court

hold that the Act as amended is *ex post facto* in the case at bar.

In conclusion counsel for Appellant respectfully calls the Court's attention to the fact that the Appellant was working in unison with the State and Federal officers in an effort to apprehend a well known narcotics dealer who was known to all the law enforcement agents and who was a citizen of Mexico. Even the testimony of the Government witnesses verify that the Appellant was working in unison with the law enforcement agencies.

That in the presence of the United States Customs Agent, Leonard Viles, a sample of narcotics was delivered by the Appellant to them. The said law enforcement officer further testified that he did not make an arrest at that time, "he was working with us . . . I had hopes of arresting a larger violator, and I didn't make any arrest at that time."

The testimony repeats that numerous other visits were made and conferences had with the Appellant and the law enforcement officers, to-wit: June 4, 1956; June 12, 1956; June 19, 1956; June 22, 1956; and July 23, 1956. (98-99). That even on the day that the Appellant was arrested, when questioned he stated, "That is for the Customs officers, . . ." (100).

The question before the Jury is whether the Appellant was telling the truth and whether the bringing across of any narcotics was in furtherance of Appellant's efforts to cooperate with the law enforcement agencies.

Because of this situation Appellant feels strongly that the Court should have instructed as to reputation. We can only conjecture as to the effect it might have had on the Jury in their deliberation. Because the Court is the trustee and conservator of the freedom of the individual, Appellant urges that he be given a new trial.

Appellant submits to this Honorable Court that he relies on the principles of law framed in the four specifications, and on the good conscience of this Court. Appellant further urges that reversible error occurred in the trial of the Appellant.

Appellant urges that it is only through the constant vigilance of this Court that the rights of the individual be not invaded and we submit that the rights of the Appellant have been, in the case at bar, violated and that judgment of conviction should therefore be reversed and the cause remanded for a new trial.

Respectfully submitted,

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No. 15597

IN THE

United States Court of Appeals

For the Ninth Circuit

MELVIN TANZER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPELLEE'S BRIEF

JURISDICTION

Appellee agrees with Appellant's statement concerning jurisdiction of the District Court and of this Court of this cause.

STATEMENT

The Appellant, Melvin Tanzer, a resident of Tucson, Arizona, was indicted under 21 U.S.C.A. 173, import heroin, a narcotic drug.

A summary of the facts is that on May 21, 1956 Melvin Tanzer was returning from Nogales, Sonora to Nogales, Arizona, at which time he was stopped at the border gate and was questioned by Leonard Viles, Customs Agent, and State Nar-

cotic Agents Peter San Angelo and Leonard Hymer, T.R. 47. Upon questioning by the three Agents, Tanzer stated that while in Mexico May 21 he had an injection of heroin, T.R. 48, 139, 146, and a fresh needle mark was observed on his arm, T.R. 146. At the trial Tanzer denied making this statement or having had an injection on this date, T.R. 86, 96. The Agents testified that the Appellant volunteered to assist in apprehending a notorious narcotic peddler living in Mexico known to Appellant and the Agents by the name of Pancho, T.R. 149. Mr. Tanzer stated, "If it wasn't so easy for me to go down there and get the stuff I wouldn't be going down there and getting it." T.R. 150. It was agreed between Tanzer and the three Agents that he would assist in effecting the arrest of Pancho. Tanzer stated that he knew him well and Pancho trusted him. Further, that he was sure that he could help to catch Pancho when he brought narcotics to the United States from Mexico. T.R. 50. The Customs Agent, Mr. Viles, told Tanzer he would like to catch this narcotic dealer and offered him a reward if he helped to catch Pancho. T.R. 50. However, he was warned that in working or assisting the Customs Service he would not be allowed to break any law or handle any narcotics himself to effect the arrest of Pancho. T.R. 50. Mr. Tanzer made trips to Nogales on the 4th, 12th or 13th, 19th and 22nd of June, 1956. After the June 4th trip to Mexico, Tanzer stated Pancho would deliver a pound of heroin to a spot near Douglas or Naco, Arizona. T.R. 51. From that date on he then had a different reason, excuse, or change of plans in the proposed delivery and sale. Tanzer testified that he had a fix from Pancho on each trip. That this was necessary to gain Pancho's confidence. T.R. 107. After the trip to Pancho's house in Nogales, Sonora on June 12 or 13, 1956, the Appellant turned over to the three Agents what he stated was a sample of heroin Pancho would deliver at some future unknown date. Tanzer testified that

Pancho sent the sample to show the quality of the heroin he was going to purchase for the proposed sale to be set up by Tanzer, T.R. 110. There was a decided discrepancy between the Appellant's testimony and that of the three Agents as to the manner in which the sample was turned over to these Agents by Tanzer, T.R. 111, 140, 147.

After the meeting of June 22, 1956, each of the three Agents informed Tanzer that he was just using them as an excuse to go to Mexico and get a fix. T.R. 58. Further, that the 'deal' between them and Tanzer was concluded, T.R. 60, and that they did not want any more to do with him. T.R. 140, 148.

Mr. San Angelo, State Narcotic Agent, saw Mr. Tanzer shortly after the date of June 22 when Tanzer came to his home. He saw him for only a few minutes during which time there was no discussion of Tanzer continuing his work on the Pancho case. This contact was the only one made with any of the three Agents by Tanzer from June 22 until he was arrested on July 23, 1956. T.R. 140, 141, 148.

On July 23, 1956 at approximately 9:50 P.M. Tanzer was observed by Flack G. Millner, a Customs Inspector, crossing the border from Nogales, Mexico to Nogales, Arizona. He was on foot and was wearing a large Mexican sombrero. T.R. 53. Millner searched Tanzer and found a package (Government's Exhibit 2) in his pocket, T.R. 35, which was analyzed by the Government chemist and found to contain 19 capsules of heroin. T.R. 82. Mr. Millner stated that approximately a month prior to the date of July 23, Mr. Viles, Customs Agent, had told him that Tanzer was no longer working with them. T.R. 43, 44. Tanzer contended the 19 capsules of heroin (approximate value in United States currency, $100.00, T.R. 120), was another sample sent by Pancho to the proposed buyer to

show quality of the heroin Pancho would soon acquire, T.R. 120, and he was only bringing sample to satisfy the Agents. The Agents testified they had never requested a sample, T.R. 45; that Tanzer had been warned that if he was apprenhended with contraband he would be treated just the same as any other person, T.R. 61, and that as of June 22, 1956 they had cancelled any future dealings with Tanzer, T.R. 58, 140, 148. Each of the three Agents was available on July 23 either in Tucson or Nogales, but Tanzer did not contact any of them prior to his trip to Mexico on July 23 as he had on his previous crossings, T.R. 141, 148, 60. Mr. Tanzer was placed under arrest at this time for importing narcotics.

The case was tried in one full day of actual trial with the jury retiring at 5:15 P.M. and returning a verdict of guilty twenty-five minutes later. T.R. 7. An information was filed on March 4, 1957 charging Appellant with a prior narcotic conviction in 1953 and on March 11, 1957 the Appellant was sentenced to 10 years imprisonment.

ARGUMENT

Throughout this section of the brief we will attempt to answer the arguments as raised in Appellant's Brief under their section "ARGUMENT" and will refer to the different points raised under similar numbers and headings with reference to page numbers in the Appellant's Brief as well as to pages in the printed transcript. If reference is to the pages in Appellant's Brief it will be so stated.

1. The Appellant contends in his Specification of Error No. 1 that the failure of the Trial Court to instruct the jury in regard to character evidence, although no request was made by Appellant for such an instruction, is reversible error.

It should be noted from the outset that the Appellant in this case proposed many written instructions and made excep-

tions thereto, but did not submit an instruction on character evidence nor make an exception that such an instruction was not given at the close of the Trial Court's Instructions. T.R. 163.

Mr. Flynn, a practicing attorney with years of experience and former United States Attorney for approximately twenty years, certainly must have known it was incumbent on him to request such an instruction if one was desired. It could well have been that after hearing these witnesses testify as to the Appellant's character an attorney of Mr. Flynn's experience thought it was to the Appellant's advantage to call no further attention of Appellant's character to the jury.

The Appellant is apparently assuming what they state the Court indicated in the case of Springer vs. U.S., 148 F.2d 411 to be the law. Certainly this case does not stand for the proposition that it is reversible error if the Court, when no request has been made, fails to give an instruction with reference to the effect of testimony as to good character. Not one of the cases cited by the Appellant stands for that proposition of law. One of the cases cited by Appellant to support their proposition is the case of Stassi vs. U.S., 50 F.2d 526. However, on reading the case in full we find that many cases are cited therein in support of Appellee's contention and on page 529 the court quotes the following from the case of Steers vs. U.S., 192 F. 1,

> "No such rule, to the broad extent to which counsel now claim for it, exists in the federal courts. True, the trial judge should instruct the jury as to the whole law in one sense of that phrase, but if there are particular theories of fact or constructions of evidence which, if adopted, would take the respondents out of otherwise proper, general inferences, or if the counsel thought that the jury should have particular instructions as to the effect of certain evidence

upon an individual defendant, or with reference to other matters of like character, respondents cannot complain of an omission of such instruction by the court, if they did not bring such matters to his specific attention by appropriate request."

For further substantiation of this point the court states in U.S. vs. Corry, 183 F.2d 155, at 159,

> "It is claimed that the failure of the court to give an instruction to the jury as to evidence of defendant's good character was error. No such instruction was asked and we have recently held that the failure specifically to discuss the matter in the charge was no error in the circumstances.
>
> "When defendant's counsel made no request for charge on character testimony trial court was not required to charge on the subject even though such evidence was introduced on behalf of the defendant." Cases cited.

Again we find the principle involved ruled on in the case of Kinard vs. U.S., 96 F.2d 522 at 524.

> "Counsel had no right however to assume that the court in the absence of a request would instruct upon the evidence concerning the character of the defendant; for while there are some subjects on which counsel may assume that the court will instruct without request, character evidence is not one of them." Cases cited.

There was not one Federal case found by the Appellee which said it was reversible error for failure of the Trial Court to instruct on character evidence where no request had been made for same. However, numerous cases were found holding that it was not reversible error. A few cases so holding other than those previously cited are:

U. S. vs. Capitol Meats, 166 F.2d 537.

U. S. vs. Antonelli Fire Works Co., Inc. et al. 155 F.2d 631.

U. S. vs. Levy, 153 F.2d 995.

U. S. vs. Newman, 143 F.2d 389.

Keiner vs. U. S., 11 F.2d 722.

Hermansky vs. U. S., 7 F.2d 458.

2. Under Specification of Error No. 2, Appellant urges the proposition that a separate offense is inadmissible for the purpose of proving the offense charged. We have no quarrel with this broad rule of law nor with the cases cited in Appellant's Brief, but upon examining the facts and issues in this case it is apparent that the rule stated has no application since this broad rule has many exceptions within which our fact situation falls. These exceptions will be discussed further herein. Appellant states on page 22 of his Brief that, "Evidence that the defendant may have possession of a narcotic kit was introduced by the Government not for the purpose of effecting the defendant's credibility but for the purpose of convincing the jury that he would be more likely to have committed the crime he was charged with."

This was not the purpose of the evidence as we will show. Appellant's case was based on the theory of entrapment. In fact, Appellant requested an instruction on entrapment and an instruction was given, T.R. 159. The Appellant testified at great length to establish a foundation upon which to base this theory in showing that he had been completely free from the use of narcotics and in no way connected with narcotics until enticed by the officers to commit the offense charged. Although we try to refrain from quoting testimony, the extent to which Appellant carried this line of testimony will become clear if we quote some excerpts.

"A. No. A uniformed man stopped my car and said that somebody would like to talk to me and would I please come inside.

Q. Where did you go then?

A. Inside the gatehouse.

Q. Do you know who that uniformed officer was? Did you find out later his name? A. No.

Q. What happened when you went inside?

A. Agents San Angelo, Hymer and Viles came in.

Q. Then what occurred?

A. They said, 'We know you have been bringing stuff across the border. Where is it?' I said, 'I haven't. I have business in Nogales; I sell bolo ties, belts, jewelry,' and I asked them to search me and they did. Then I gave them my car keys. In the process of searching me, I believe Mr. Sam Angelo said, 'Isn't that a puncture in your arm?' I said, 'No, it isn't.' He said, 'It looks like one,' and I said, 'You had better get a doctor and prove it.'

Q. Did any of them at that time make any statement accusing you of having a "fix" or "shot" that day? (78)

A. They said it looked like I had one.

Q. Go ahead.

A. Sam Angelo said, 'I guess we will have to book him for ninety days.' I said, 'What for?' And he said, 'Internal possession.' I asked for a doctor and he said, 'We don't have to get you no doctor. I can throw you in for ninety days and when you come out I can throw you in for another ninety days.'

Q. Who said that? A. San Angelo.

Q. Who else was there?

A. Hymer and Viles. They said, 'Do you know Pancho?' and I said, 'I have heard of him. Every merchant in Nogales has heard of him.'

Q. What else was said?

A. Viles said, 'It would be a benefit to society if Pancho was put away,' and I said, 'Yes, it would.' San Angelo and Viles went out to search my car and they didn't find anything, so they said 'Jump in the car and follow us,' and I did, to the Customs House in Nogales.

Q. Did they make any other search that day?

A. They searched myself.

Q. What kind of search did they make of you that day?

A. They had me strip completely nude and they went through my motor and every place in the car. Some of the (79) upholstery was ripped, too. Then they said, 'You come with us,' and I drove my car to the Customs House, I believe.

Q. Some distance from the border?

A. Right through town, about a mile away, I would say. And in the back of the house I got out of my car and into Viles' car, then we started to talk about this Pancho and they asked me if I knew him, and I said, 'No, I have never been to his house; I know of him.' San Angelo was the one that suggested that I bring him across, and Viles said, 'If you could bring him across it would be worth $500.00 or up to $2,000.00 if he is apprehended on this side.' I said I wasn't interested in the money. Hymer was the one that said it would be a benefit to society—he was,

I would say, the honorable one. San Angelo was the one that said, 'If you doublecross us I will come to the store and pull you out to jail, and if I see you on the street I will throw you in jail.' So I said I had to go back to Nogales on business and I would try." T.R. 85, 86, 87.

". . . and at that time San Angelo searched me and said, 'I hope that you are doing the right thing,' and then he threatened me the same as before, that he would come to my store or stop me on the street and throw me in. Viles was the one that said, 'We can get you a new car if this thing goes as planned, because we have wanted him for quite sometime. So I said, 'Fine, but I have to get back,' and Viles took me back and went into the store and told my boss he needed me a little while longer—not to worry, that I am a good boy and he just needed me in a special thing and that was it.

Q. Now this first time you testified about when they stopped you and searched you, somebody accused you of having a mark on your arm? (90)

A. Yes.

Q. Had you had any narcotics that day?

A. No.

Q. When was the first time, or did you on some of those trips over there have what is known as a "fix" or "shot"?

A. Yes.

Q. When was that?

A. When I had to go to Pancho's house.

Q. And why did you do that?

A. Not only to gain confidence, but to make it plaus-

ible, the thing I was doing. Otherwise he would never listen to reason or anything like that.

Q. Now, Mr. Tanzer, you have been a user of narcotics?

A. Yes.

Q. Up to the time that you made this trip to Nogales and had this shot up there at Pancho's, how long had it been since you had used any narcotics.

A. Approximately two years.

Q. What? A. Approximately two years.

Q. Are you using any now? A. No, sir.

Q. Outside of the time you testified about, have you used any at all in the past two or three years?

A. No, sir. (91)

Q. Did these officers know that, Mr. Tanzer, that you had been a user of narcotics? A. Yes.

Q. All of them knew that? A. Yes." T.R. 96, 97.

"Q. Outside of the times you brought over those two samples, had you ever brought narcotics or heroin to the United States? A. No.

Q. Do you work every day? A. Yes.

Q. And you have been for the past two years?

A. Yes." T.R. 101, 102.

Since Appellant had testified to this extent in his direct examination, it certainly became incumbent on the prosecution to cross-examine him, not for the purpose of attacking his credibility alone, but for the purpose of attacking his theory of

entrapment. Under cross-examination, Appellant not only repeated his allegations that he was using no narcotics but even accused the officers with attempting to furnish him with narcotics seized in other cases.

"Q. During this time when you were taking those fixes at Pancho's house, were you using any other narcotics during that period? A. No.

Q. Did you have any narcotics equipment or paraphernalia? A. No.

Q. During this time when you were going back and forth to Nogales with San Angelo, did you ever turn over a narcotic kit to him? A. No. (122)

Q. You never did? A. No.

Q. You never discussed turning over a kit and tell him you wanted to get off the stuff? A. No.

Q. And you never told him you had another kit stashed in a filling station in town?

A. Quite the contrary.

Q. What to the contrary?

A. He opened the glove compartment and said, 'If you want some stuff, go ahead and take it.'

Q. San Angelo was giving you a "fix"?

A. He said, 'I have some other cases, and if you don't want them I will send them to Phoenix.'

Q. Why was he being so free with you?

A. I don't know.

Q. He was going to let you use the narcotics he had seized in other cases? A. Yes.

Q. Just taking a little out of each case?
A. I don't know how he was going to do it.

Q. Well, what did you say?

A. 'No thanks?' " T.R. 122, 123.

After such testimony by Appellant the prosecution had no choice other than to introduce testimony to contradict the charges made by Appellant. Otherwise the jury would certainly have been inflamed and enraged against the officers involved in the case. When the prosecution then questioned Officer San Angelo, T.R. 135, the testimony was not a collateral attack, but concerned a definite and special portion of the offense, that of entrapment. The cases cited in Appellant's Brief are completely different from the situation involved here, therefore, they are not controlling. Therefore, it was proper for the prosecution to go into this line of testimony which the Appellant had opened. It should be pointed out to the Court that although the rule stated in the Appellant's Brief is correct it is by no means a narrow rule, nor is it to be strictly applied, in fact, the exceptions are so numerous that the cases may seem to fall more within the exceptions than within the general rule.

In the case of Hardy v. U.S., 199 F.2d 704 at 707, the Court states:

> "The exclusionary rule, which furnishes the foundation for the argument, that evidence of arrest, incarceration or conviction for other offenses is not admissible against a defendant, is not one of such unqualified application as to prohibit absolutely and for every purpose the receiving of any evidence which may reveal the existence of this fact. Exceptions have always been recognized as a matter of sound need in the practical administration of justice. Thus, it has repeatedly been held that the rule will not be given application to exclude evidence which may incidentally

show arrest, incarceration or conviction for some other offense, but which has relevancy and competency otherwise, and which the trial court responsibly deems a necessary or not inappropriate means in the particular situation of establishing some material fact or aspect of the prosecution's case. (Cases cited).

"Commonly, the exception has been the subject of a terser phrasing, as, for example, Judge Learned Hand's characteristic expression, in United States v. Glory Blouse & Sportwear Co., 2 Cir., 158 F.2d 880, 881, that 'it is abundantly settled (indeed the contrary would be preposterous) that relevant evidence does not become incompetent because it incidentally proves that the accused has committed an independent crime.' But inherent in the exception, even though not directly stated, as we have done above, is the responsibility of the trial court as a matter of discretion or exercised judgment in relation to whether the evidence is necessary or should be permitted in the particular situation—as, for example, where other sufficient evidence to establish the fact to which the extra-incriminating evidence is relevant may be readily available, or where the fact has already been sufficiently otherwise established so that the extra-incriminating evidence will merely serve an unneeded corroborative function. (Cases cited).

"The point which must be borne in mind here, however, is that, whatever may have been the ruling of the trial court in relation to the receipt or rejection of such evidence in any specific situation, the question on appeal is not a plenary one, but one which is subject to the limitation that —to adopt the language used in the Michelson case, (335 U.S. 469, 69 S.Ct. 221), 'rarely and only on clear showing of prejudicial abuse of discretion will Courts of Ap-

peals disturb rulings, of trial courts on this subject.' "

The Hardy case, supra, is followed and certain portions quoted in the case of Bran vs. U.S., 226 F.2d 858 at 863. This case held different evidence admissible which (1) showed a prior arrest of defendant, (2) indicated that defendant was supporting a child as a result of a bastardy proceeding, and (3) that a particular witness first met the defendant in a reformatory.

It is apparent that all these cases concern themselves with other "offenses and crimes." In the present case, the mere possession of a narcotics kit is neither a Federal or State offense.

As noted above, in the quotation from the Hardy case, supra, the admission of such evidence should be practically in the exclusive performance of the Trial Court. This rule was stated by the Supreme Court in Michelson vs. U.S., supra. It is obvious from the record that the Trial Court considered this testimony prior to admitting it and even instructed the jury that, "The defendant is not on trial for any act not alleged in the indictment." T.R. 160.

3. The proposition involved in Specification of Error No. 3 is whether or not sufficient evidence was introduced to properly identify Government's Exhibit No. 2. As stated in Appellant's Brief, on page 28, it is admitted that the evidence adduced at the trial showed a continuity of possession. The Government's evidence showed that only three Government witnesses handled Government's Exhibit No. 2 before the substance contained therein was analyzed by a Government chemist. Each witness testified exactly what he did with the Exhibit when it was in his possession. T.R. 36, 37, 61, 78. None of the questioning by Appellant in any way suggested or even tried to suggest that Government's Exhibit No. 2 had been tampered with or was in a different condition than when taken

from Appellant. The Exhibit was initialed by each person that handled it and examined thoroughly by each witness in the trial before identifying the Exhibit.

Apparently the Appellant is attempting to draw an inference from the case of Boyd vs. U.S., 30 F.2d 900 to support their proposition. Our research certainly does not in any way substantiate the statement set forth in the third paragraph of Appellant's Brief on page 29. The chain of evidence and testimony concerning the narcotics admitted into evidence in the case of Chin Gum vs. U.S., 149 F.2d 575 was similar to our case though not as complete and specific as the evidence concerning Government's Exhibit No. 2. Even so, in the Chin Gum case, supra, the Court stated at page 577, "From the facts stated it is obvious that it was evident that the can offered and admited as an exhibit was one received by Oleviera from Chin Gum and the one which the chemist found to contain smoking opium. The fact that there is no positive evidence as to the whereabouts of the can from the time the chemist analyzed its contents to the time of trial is of no consequence. In the absence of suspicious circumstances, it is enough that there is evidence that the can produced by the Government at the trial came into the Government's possession before trial."

Also, we find the exact principle involved in this Specification of Error discussed in the case of U.S. vs. S. B. Penick and Co., 136 F.2d 413, in which the court citing from the case of Pennsylvania Railroad Co. vs. Fox and London, 93 F.2d 669, certiorari denied, 304 U.S. 566, and Hanify Co. vs. Westberg, 16 F.2d 552, states at page 415,

> "It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid., 11th Ed. 757. But

there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. (case cited). In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed. 437(1); 32 C.J.S., Evidence, 607. In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples; they were put in the usual place where samples were kept to remove them from accident or meddling and there they remained, so far as appear, undisturbed. We think this showing was sufficient to justify admission in evidence of the bottles and their contents and that it was for the jury to decide how likely it was that some other substance had been substituted for what was originally put in the bottles . . ."

In the case of U.S. vs. Singer, 43 F.Supp. 868 the court held,

"In prosecution for possession or sale of narcotics otherwise than in original stamped package and from possession and sale of narcotics illegally imported where evidence identified sample analyzed with article seized, the fact that sample was lost or destroyed after analysis would not prevent proof of analysis, the loss or destruction of sample going solely to the weight of the evidence."

There is no dispute that Government's Exhibit No. 2 was positively identified and traced by each witness that touched it from the time it was removed from the Appellant. As previ-

ously stated, there was no evidence even suggesting that it was or might have been tampered with. Since the contents of each capsule had been chemically analyzed, the Exhibit could not be in exactly the same condition as when removed from the Appellant, but certainly the showing made was more than enough to justify its admission into evidence and then it was for the jury to decide if for any reason they felt they should disregard the testimony concerning Government's Exhibit No. 2.

4. As stated in the Appellant's Brief, in the case of Wilson vs. U.S., 205 F.2d 567, citing MacDonald vs. Massachusetts, 180 U.S. 311, 21 Supreme Court 389, 45 L.Ed. 542, this Court answered the exact question raised by the Appellant's Specification of Error No. 4. There being no indication that the ruling in the Wilson case, supra, is being attacked or questioned in any court, we will not take the Court's time by any additional discussion.

CONCLUSION

Upon considering the Specifications of Error raised by Appellant in light of all the arguments, it is readily apparent that no reversible error occurred in the trial of this case. It is further apparent from the Transcript and the Trial Court's Instructions that the Appellant was accorded a fair and impartial trial and his rights were protected fully throughout by the Trial Court.

Undoubtedly the jury, which indicated intelligence and deligence above the average jury, decided that the Appellant, who appeared smooth and fast-talking, duped the officers into believing that he was assisting them in the apprehension of a

notorious narcotics trafficer, when in truth he was acting for the purpose of obtaining narcotics for his own personal use. Therefore, we respectfully request that the Court sustain the conviction and judgment entered herein.

Respectfully submitted,

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